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### Herziening van de zedendelicten?

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# Overhaul of the Dutch sexual offences?

*An analysis of the Dutch sexual offences in terms of consistency, complexity and standards*

K. Lindenberg & A.A. van Dijk

## Summary

### Introduction

This study examines whether the legislation on sexual offences (Title XIV, Book II of the Dutch Criminal Code) should be revised. In itself this question is not new. Since the introduction of the Title on sexual offences in 1886 amendments have frequently been proposed and many of them have led to ratification. In other words, the Title on sexual offences has already often been subject to change. A great deal has been built on to the old foundation dating from 1886, some of these additions have later been taken down or moved, and in recent decades various new additions have been made. Precisely because of this, the question of revision has arisen again, but now more in the sense of a systematic overhaul.

As early as in 1980 a comprehensive revision was proposed by the Advisory Committee on Sexual Offences Legislation (the Melai Committee). However, political developments meant this did not happen; the only result was some important but limited amendments which were implemented in 1991. In 1993, 1994, 1996, 2000 and 2002 new amendments were made to the Title on sexual offences, partly on the basis of international agreements. When the amendments of 2002 were being prepared, there were calls for reconsideration of a complete overhaul, but in the Minister's opinion a full revision was not an option at that time because haste was required due to international obligations. It would be up to a following government to see if a complete overhaul should be undertaken. Nor did the Minister see any content-related reason to proceed to a more comprehensive revision.

In subsequent years the question of revision did not arise again. However, the Title on sexual offences was amended again in 2005 and 2010, partly on the basis of international instruments. When the most recent amendments of 2014 – which were necessary because of a new European Union directive – were being prepared, the Council of State drew attention to some apparent inconsistencies which would result from the proposed amendments. The Council also questioned whether there would still be enough balance between the various maximum sentences in the Title on sexual offences. In the Council's opinion the developments did not enhance the clarity of the standards

established. The government was asked to examine the desirability of reviewing and simplifying the Title on sexual offences in the future.

According to the Minister, the previous amendments had not led to a breakdown in the consistency of the penal provisions or a pronounced imbalance in the various maximum sentences. Nor was he aware of any complaints of this nature from the legal profession. However, in response to the Council of State's criticism, the Minister did commission the present study. The objective of the study was, within a limited period of time, to answer the question whether the Title on sexual offences, in connection with possible defects in its internal consistency, should be completely or partially revised.

## **Study design and questions**

This study objective resulted in the formulation of the following three assessment factors with accompanying definitions:

### *Consistency*

The extent to which an explainable and rational relationship exists between the elements of a particular provision, between the different provisions of the Title on sexual offences, and between those provisions and provisions outside the Title, including provisions of international origin.

### *Complexity*

The extent to which an effort must be made to fathom the meaning of and connections between provisions.

### *Standards*

The standards as expressed in the elements and the maximum sentence in a provision and the relationship between that maximum sentence and those in other provisions.

The question whether the Title on sexual offences should be revised is related to these three factors. The importance of having criminal law that is sufficiently consistent, is not too complex and sets clear standards was then associated with three groups of stakeholders: the public, the legal profession and politicians.

Because it is clear that the assessment factors are difficult to quantify and that no specific benchmark can be designated beyond which a thorough overhaul is required, we had to use rougher and not fully objectifiable gradations. This study took the following criterion as its basic principle:

The Title on sexual offences should be thoroughly overhauled if it is found that there is a high degree of inconsistency, complex regulations and vague standards.

The Minister's responses discussed above, to the question whether the Title on sexual offences needed to be revised, reflects similar criteria. The criterion chosen for this study implicitly takes into account the caution which must be observed with regard to an overhaul of the Title on sexual offences. The point of departure is that the benefits of a revision will, by definition, outweigh the costs of legislation when the public, the legal profession and politics have to

deal with a *high degree* of inconsistency, complex regulations and vague standards. In the researchers' opinion, it must also be borne in mind that the cost-benefit analysis involved is not purely economic, but also constitutional.

The leading question in this study is whether the state of the Title on sexual offences in terms of consistency, complexity and standards gives rise to the conclusion that the Title should undergo a thorough revision. This general question was divided into the following four research questions. The chapter numbers in brackets show in which chapters the various questions are discussed.

*Research question 1*

What details are striking in the definitions of sexual offences in terms of consistency, complexity and standards? (Chapter 2)

*Research question 2*

What suggestions for revision in terms of consistency, complexity and standards were made in interviews with lawyers? (Chapter 3)

*Research question 3*

What suggestions for revision in terms of consistency, complexity and standards have been made in the literature since 1999? (Chapter 3)

*Research question 4*

Do the answers to the previous questions give rise to the conclusion that the Title on sexual offences should undergo a thorough revision? (Chapter 4)

## **Chapter 2 and Chapter 3**

Chapters 2 and 3 are not structured according to the classification of sexual offences in the legislation on sexual offences, but have their own structure. This choice was a result of the observation that this approach made it easier to identify and prioritize groups of offences in the study. The main groups of offences are: (i) sexual offences against juveniles, (ii) sexual offences against mentally or physically disabled people, (iii) sexual offences against functionally dependent people, (iv) sexual offences by force, and finally (v) grounds for increased maximum penalties.

Chapter 2 analyses the Title on sexual offences in terms of consistency, complexity and standards, using national and international regulations, legislative history, case law and literature. This chapter also contains general introductions to various sexual offences, so that not only the details that struck us are discussed, but also the basic structures underlying the Title on sexual offences.

The analyses examine the following subjects in detail: the content and placement of the element of 'indecenty' (*ontucht*); the different ways in which this element is linked to acts of either the perpetrator or the victim; age limits and culpability in relation to sexual offences against juveniles; the extent to which sexual offences apply to sexual contact (digital or otherwise) with juveniles in which no physical contact is involved; the different ways in which

‘incitement to indecency’ (*uitlokken van ontucht*) has been penalized; and finally, grounds for increased maximum penalties.

Chapter 3 reports on the suggestions made for revision of the sexual offences Title during the interviews held for this study and in the literature. Seventeen interviews with lawyers were held for the study and a separate literature review was carried out. The interviews were with lawyers who have to deal with the sexual offences Title in the course of their work. Five public prosecutors, five criminal lawyers, five judges, the National Rapporteur on Human Trafficking and Sexual Violence against Children and a criminal law researcher were interviewed. The literature review also made use of a legislative memorandum (included in this study as Appendix 3) given to us by the Public Prosecution Department’s Board of Procurators-General. This document was written by three public prosecutors involved with sexual offences and contains a number of specific suggestions for revision of the Title on sexual offences, explaining the reasons. Because these public prosecutors were also asked to comment on the sexual offences Title as respondents, readers should be aware that the legislative memorandum cannot be regarded as a source that is entirely independent of the interviews.

The analysis of the interviews and the literature resulted in almost two hundred suggestions for revision. In Chapter 3 these have been classified according to topic.

## Chapter 4

Chapter 4 evaluates those issues which seem to have the biggest negative impact on consistency, complexity and standards in the Title on sexual offences. Because of the large number of offences and connections between them, the evaluation frequently refers to the analyses in Chapter 2.

In particular, we examined legal structure, the mixed character and headings of Title XIV, the ‘indecency’ element and the context in which that element functions, sexual offences against juveniles, and grounds for increased maximum sentences.

On the basis of our findings, we came to the conclusion that the Title on sexual offences should in fact be revised.

First of all we would like to point out that in some cases quite simple amendments by the legislator would resolve certain issues:

- remove the term ‘out of wedlock’ (*‘buiten echt’*) from Articles 245 and 247 of the Dutch Criminal Code<sup>1</sup>;
- change the phrase ‘a minor’ (*‘een minderjarige’*) into ‘a person below the age of 18’ (Articles 248, 249 and 250 of the Dutch Criminal Code)<sup>2</sup>; and

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<sup>1</sup> See Section 4.5.2.

<sup>2</sup> See Section 4.5.2.3. In principle the same might apply to Art. 240a of the Dutch Criminal Code, but because of the structure of the article, in this case it would be better to replace the

- make reference to Articles 242 and 244 of the Dutch Criminal Code in Article 248(7) of the Dutch Criminal Code.<sup>3</sup>

Nevertheless, in the researchers' opinion the other issues are of such a nature that a comprehensive revision of the Title on sexual offences should be considered by the legislator. In terms of the stated criterion, there is, according to the researchers, 'a high degree of inconsistency, complex regulations and vague standards'. This conclusion is supported by the various observations made in Chapter 4 regarding consistency, complexity and standards in relation to the assessment of the separate issues. To summarize, the following points were established:

- the highly inaccessible structure of the Title on sexual offences<sup>4</sup>;
- the unclear meaning of the term 'indecenty' in relation to the age limits in the Title on sexual offences<sup>5</sup>;
- the inconsistent way in which the term 'indecenty' is included or not included in a provision<sup>6</sup>;
- the complex distinction, open to a variety of interpretations, between 'perpetrating' by the perpetrator and 'perpetrating' or 'tolerating' by the victim<sup>7</sup>;
- the complexity and very widely ranging interpretations of the prepositions 'with' (perpetration 'with') and 'of' (toleration 'of')<sup>8</sup>;
- the complex system of ages, some of which are and some of which are not 'objective' – i.e. it is actual age that counts, not the age the perpetrator thought the victim was<sup>9</sup>;
- the inconsistencies between and the widely varying interpretations of Articles 247, 248a and 248d of the Dutch Criminal Code<sup>10</sup>;
- the inconsistencies between Articles 248d, 240a and 239 and the widely varying interpretations of Articles 240a and 239 of the Dutch Criminal Code<sup>11</sup>;
- the complex content of Articles 248c and 240b of the Dutch Criminal Code both separately and in relation to each other<sup>12</sup>;
- the existence of seven forms of incitement to indecenty with a third party<sup>13</sup>;
- the unclear function of Article 248a as regards the protection of persons under the age of 16<sup>14</sup>;
- the unclear function of Article 249(1) as regards the protection of persons under the age of sixteen<sup>15</sup>; and

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term 'minor' with 'person' (at present the relevant part of Article 240a reads: 'a minor he knows or could reasonably be expected to know is younger than sixteen years of age').

<sup>3</sup> See Section 4.6.3.5.

<sup>4</sup> See Section 4.2.

<sup>5</sup> See Section 4.4.2 and 4.5.3.

<sup>6</sup> See Section 4.4.3.

<sup>7</sup> See Section 4.4.4.

<sup>8</sup> See Section 4.4.4 and 4.5.5.

<sup>9</sup> See Section 4.5.4.

<sup>10</sup> See Section 4.5.5.2.

<sup>11</sup> See Section 4.5.5.3.

<sup>12</sup> See Section 4.5.5.4.

<sup>13</sup> See Section 4.5.6.

<sup>14</sup> See Section 4.5.7.

- the wide variety of ambiguities regarding the content of the grounds for increased maximum sentences and their relationships with other provisions.<sup>16</sup>

The researchers realize that a study that examines in detail the components of and their interrelationships in any part of criminal law will be very likely to discover a large number of peculiarities. The conclusion that a 'high degree' of defects was present was therefore not based on the number of issues found, but on their estimated intensity. In particular, in the researchers' view the problems have a strong impact on the biggest group of offences in this Title – sexual offences against juveniles. All of the issues listed above are related to this category of offences.

The study did not show that juveniles in the Netherlands clearly have too little protection. As far as could be ascertained, broadly speaking Dutch criminal law provides the same general protection as surrounding countries. In the researchers' opinion, the main weakness identified is that it is no longer possible to distinguish sexual offences against juveniles from each other. In many cases the substantive difference between offences with a very high maximum penalty and offences with a low maximum penalty is impossible to discover, which means that the details and components have become less and less indicative. The researchers believe this is made clear in the Public Prosecution Service's 'Guideline for Prosecuting Cases of Sexual Abuse against Juveniles', which recently came into force. This Guideline finds that the maximum sentences for sexual offences do not provide an adequate frame of reference for making choices about prosecution and determining sentences.

At the same time it is evident from published judgments of lower courts that opinions about the interpretation of the components of offences against juveniles frequently vary widely, which in many cases made the difference between an acquittal and a conviction. In other words, on the one hand there is a kind of levelling out of offences, but on the other hand similar cases are treated unequally.

These factors are mainly seen in the prosecution of acts not involving physical contact, particularly the prosecution of 'digital indecency' (sexual acts in a digital context). The researchers have a strong impression that the sexual offences Title is not adequately equipped to give a clear place to the various forms of 'hands-off' abuse and increasing digitization.

According to the researchers, the weaknesses identified do not primarily relate to the substantive protection of victims, but to the position of members of the public as suspects or potential suspects, and the position of people who have to deal with the sexual offences Title in the course of their work. This study may show that for public prosecutors, defence lawyers, judges and politicians it is becoming increasingly difficult to assess the state of affairs regarding sexual offences. Ultimately these issues also affect victims, if they wish to complain about a prosecutorial decision or wish to express an opinion during

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<sup>15</sup> See Section 4.5.8.

<sup>16</sup> See Section 4.6.

the criminal proceedings about the evidence, the label of the offence or an appropriate punishment.<sup>17</sup>

In Chapter 2 (our own analyses) and Chapter 3 (suggestions for revision in interviews and the literature) some peculiarities emerged which are not analysed in further detail in Chapter 4. The main reason for this is that an evaluation of these peculiarities should be based primarily on views on legal policy. Some of the questions involved are:

- should communication with children that has sexual overtones be punishable as such?<sup>18</sup>
- should covert filming with a sexual purpose be made punishable as a sexual offence?<sup>19</sup>
- should the sexual abuse of deceased persons be made punishable as such?<sup>20</sup>
- should Articles 242, 243, 244 and 245 of the Dutch Criminal Code also apply to sexual penetration of the suspect and sexual self-penetration by the victim?<sup>21</sup>
- should the penalization of rape and sexual assault be broadened?<sup>22</sup>
- should the wording of passages about mental incompetence in Articles 243 and 247 of the Dutch Criminal Code be adapted?<sup>23</sup>

The proposal that a complete overhaul of the legislation be considered is accompanied by the knowledge that it will never be possible to remove all the difficult elements and interconnections from the sexual offences Title. Nevertheless, the researchers are convinced that the Title could be considerably clearer and more structured than it is now.

Finally it should be noted that the proposal that a complete overhaul of the legislation be considered, does not imply that in the researchers' view the problems necessarily require the whole Title to be amended. It is also conceivable that some of the discussed offence definitions might retain their current form, but that the legislature would reapprove and reclassify them and add explanatory notes relating to the problems that have arisen. In that respect the proposal, we might say, is for partial revision and complete rethinking.

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<sup>17</sup> As regards this last element, see the pending Bill on supplementing the rights of victims and survivors to be heard in criminal proceedings (legislation file 34 082). At the time of writing there seems to be a considerable amount of political support for this Bill.

<sup>18</sup> See Section 2.4.4.6, 2.4.4.11 and 3.8.2.

<sup>19</sup> See Section 2.9.2 and 3.8.1.

<sup>20</sup> See Section 2.9.3.

<sup>21</sup> See Section 2.3.5.2 and 2.7.2, and also revision suggestions #27 en #169 in Chapter 3.

<sup>22</sup> See Section 2.7.3 and 2.7.4, and also the revision suggestions mentioned in section 3.5.

<sup>23</sup> See the revision suggestions mentioned in section 3.3.